

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

AQUA ILLINOIS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 2023-012
	)	(Permit Appeal - Public Water Supply)
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
	)	
Respondent.	)	

**NOTICE OF ELECTRONIC FILING**

To: *See Attached Service List*

PLEASE TAKE NOTICE that on the 8th day of August, 2022, I caused to be filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the attached Respondent's Motion for Permission to File Reply to Petitioner's Response in Opposition to Respondent's Motion for Extension of Time to File the Record, a true and correct copy of which is attached hereto and hereby served upon you.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

/s/ Kathryn A. Pamenter  
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**SERVICE LIST**

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**CERTIFICATE OF SERVICE**

I, Kathryn A. Pamenter, a Senior Assistant Attorney General, hereby certify that on the 8th day of August, 2022, I caused to be served the foregoing Notice of Electronic Filing and Respondent's Motion for Permission to File Reply to Petitioner's Response in Opposition to Respondent's Motion for Extension of Time to File the Record upon the parties named on the attached Service List, via e-mail or electronic filing as indicated.

*/s/ Kathryn A. Pamenter* \_\_\_\_\_  
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**RESPONDENT’S MOTION FOR PERMISSION TO FILE REPLY TO PETITIONER’S  
RESPONSE IN OPPOSITION TO RESPONDENT’S MOTION FOR EXTENSION OF  
TIME TO FILE THE RECORD**

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Respondent”), by and through the Attorney General of the State of Illinois, KWAME RAOUL, and pursuant to 35 Ill. Adm. Code 101.500(e), hereby moves for permission to file a reply to Petitioner’s Response in Opposition to Respondent’s Motion for Extension of Time to File the Record. In support of this motion, Respondent states as follows:

1. On June 29, 2022, Respondent issued a Special Exception Permit to Petitioner (the “June 2022 Permit”).
2. On July 8, 2022, Petitioner filed its Petition for Review of the Illinois Environmental Protection Agency’s Special Exception Permit Decision (“Petition”) and Motion for Partial Stay, PCB 2023-12 (the “Permit Appeal”).
3. On August 2, 2022, Respondent filed its Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 and its Motion for Extension of Time to File the Record, which incorporated such Motion to Dismiss by reference.

4. On August 3, 2022, Petitioner filed its Response in Opposition to Respondent's Motion for Extension of Time to File the Record ("Response"), in which Petitioner contends that Respondent is engaged in an improper "pattern of behavior". (Response at ¶ 9.)

5. Section 101.500(e) of the Illinois Pollution Control Board's ("Board") Procedural Rules states, "[t]he moving person will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response." 35 Ill. Adm. Code 101.500(e). In this matter, Respondent has timely filed this Motion for Permission, as the 14-day deadline ends on August 17, 2022.

6. In the absence of an opportunity to file a Reply to Petitioner's Response, Respondent will be materially prejudiced. Specifically, Respondent must be permitted to reply to Petitioner's baseless arguments that Respondent (a) has failed to comply with the Board's Procedural Rules and July 21, 2022 Order, and (b) is engaged in a "strategy of obfuscation and delay". (See Response at ¶¶ 1, 3-4, 8-9.)

7. Respondent has prepared a Reply that responds to Petitioner's Response. A copy of such Reply is attached hereto as Exhibit A. By this motion, Respondent seeks permission to file its Reply to avoid material prejudice.

WHEREFORE, Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Board or the hearing officer grant it permission to file its

Reply to Petitioner's Response and such other relief as the Board or the hearing officer deems appropriate.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

/s/ Kathryn A. Pamenter

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**RESPONDENT'S MOTION FOR PERMISSION TO FILE REPLY TO PETITIONER'S  
RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR EXTENSION OF  
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**EXHIBIT A**

**Respondent's Reply to Petitioner's Response in Opposition to  
Respondent's Motion for Extension of Time to File Record**

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**RESPONDENT’S REPLY TO PETITIONER’S RESPONSE IN OPPOSITION TO  
RESPONDENT’S MOTION FOR EXTENSION OF TIME TO FILE THE RECORD**

Section 105.212(a) of the Board’s<sup>1</sup> General Provisions for Permit Appeals requires the filing of one Agency record of decision for this Permit Appeal (“Record”). 35 Ill. Adm. Code 105.212(a). Through its Petition, Petitioner removed from consideration in this Permit Appeal, the June 2022 Permit generally and Additional Condition Nos. 1, 2, and 7 specifically. (*See, e.g.*, Petition at Section II, ¶ 46, and p. 17.) Similarly, to the extent that the Board grants Respondent’s pending Motion to Dismiss Permit Appeal as to Additional Condition No. 6, the issues on appeal, and thus the scope of the Record, will be further narrowed. Notwithstanding the foregoing, Petitioner contends that Respondent and the Illinois Attorney General’s Office are engaged in a “strategy of obfuscation and delay”. (*See* Response at ¶ 9.) Petitioner offers no support for such accusation. (*Id.*) In fact, Respondent has complied with 35 Ill. Adm. Code 105.116(a) and the Board’s July 21, 2022 Order in filing its Motion for Extension of Time to File the Record (“Motion for Extension”). In addition, Respondent did not oppose Petitioner’s Motion for Partial

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<sup>1</sup> Capitalized terms used, but not defined herein, shall have the meanings ascribed to such terms in Respondent’s Motion for Permission to File Reply to Petitioner’s Response to Respondent’s Motion for Extension of Time to File the Record.



Stay as to Additional Condition Nos. 3, 4, and 5, thereby rendering Petitioner's harm argument void as to those conditions. Accordingly, Respondent's Motion for Extension should be granted.

**I. Respondent Timely and Properly Sought an Extension of Time to File the Record.**

The Board's General Provisions for Permit Appeals expressly authorize extensions of the filing deadline for the Record. Specifically, Section 105.116(a) provides, in pertinent part, that "[t]he State agency must file with the Board the entire record of the Agency's or OSFM's decision, as applicable, within 30 days after the filing of the petition for review, unless this Part provides otherwise, or the Board or hearing officer orders a different filing date." 35 Ill. Adm. Code 105.116(a). Contrary to Petitioner's contention, Response at ¶ 1, the Board has recognized Respondent's right to seek an extension of the Record filing deadline in this Permit Appeal: "*[u]nless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by August 8, 2022, which is 30 days after the Board received Aqua's petition.*" (Order of the Board at p. 2 (July 21, 2022) (emphasis added) (citing 35 Ill. Adm. Code 105.116(a), 105.212(a)).

Respondent's Motion for Extension complied with the requirements of 35 Ill. Adm. Code 105.116(a) and the Board's July 21, 2022 Order. First, such motion was timely filed on August 2, 2022, well in advance of the August 8, 2022 deadline. Second, contrary to Petitioner's "frivolously-reasoned" accusation, Response at ¶ 9, the Motion for Extension sets forth a sound basis for seeking an extension. Specifically, Respondent's contemporaneously-filed and incorporated-by-reference Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 seeks a decision from the Board regarding whether the Permit Appeal as to such condition may proceed, given the pending litigation in the Will County Circuit Court on the same cause between the same parties. To the extent that the Board grants Respondent's Motion to Dismiss the Permit

Appeal as to Additional Condition No. 6, the issues for determination will be narrowed which, in turn, will narrow the scope of the Record.

Petitioner's reliance upon *E & L Trucking Co. v. IEPA*, PCB 02-53, slip op. (April 18, 2002), does not require a different result. (Response at ¶ 1.) Unlike in this case, the Agency in *E & L Trucking* did not file the record or a motion for extension of time prior to the regulatory deadline. *See E & L Trucking*, slip op. at p. 1. In addition, the *E&L Trucking* decision acknowledges Respondent's right to seek an extension of the record filing date. *Id.* at pp. 2-3. Specifically, in discussing the 30-day deadline for filing the record, the Board stated in its entirety:

Historically, problems have occurred in the processing of permit appeals before the Board because of late-filed Agency records. When the Board revised its procedural rules, we extended the time for filing Agency records from 14 days to 30 days, in part at the Agency's request. Since 14 days was too short a time to be realistic, especially with large permit records, the rule was generally not observed. To avoid having the rule ignored, the Board extended the timeframe to 30 days. This change was based upon the belief, that the Agency did not contradict, that such a timeframe was realistic, allowing the Agency to effectively comply in most instances. *To further enhance compliance, the rule provides that if the Agency is unable to comply, it may seek an extension prior to the due date of the record. The rule allows flexibility for the hearing officer or Board to order a different due date, in consideration of the likelihood and timeframe for proceeding to hearing.*

*Id.* (emphasis added). Because Respondent timely and properly sought an extension of the Record filing deadline in accordance with 35 Ill. Adm. Code 105.116(a), the Board's July 21, 2022 Order, and the *E&L Trucking* decision, its Motion for Extension should be granted.

## **II. No Pattern of Delay Exists in this Permit Appeal.**

Respondent has complied with the Board's Procedural Rules and sought to expedite issues in this Permit Appeal. First, Respondent could have filed a motion to dismiss the Permit Appeal in its entirety on July 22, 2022, as Petitioner failed to obtain Respondent's prior consent to electronic service of the Petition. 35 Ill. Adm. Code 101.304(g), 101.500, 101.506, 101.1060(a), 101.1070. *See also* Petitioner's Petition, Dkt. Entry – Initial Filing, at Certificate of Service;

Respondent's Appearances filed on July 19, 2022. Instead, Respondent sought only a one-week extension of the 14-day period to respond to Petitioner's Motion for Partial Stay, to which Petitioner agreed, and timely filed on July 19, 2022, its corresponding motion for extension in accordance with 35 Ill. Adm. Code 101.500(d). Contrary to Petitioner's contention that this constituted a delay, Response at ¶ 9, the brief agreed-upon extension afforded Respondent a sufficient opportunity to review Petitioner's Motion for Partial Stay and determine not to object to such motion, *see* Respondent's Response to Petitioner's Motion for Partial Stay filed on July 29, 2022. Moreover, the agreed-upon stay of Petitioner's obligations under Additional Condition Nos. 3, 4, and 5 refutes Petitioner's assertion that "a timely decision is critical" as to those conditions. (Response at ¶ 5.)

Second, Respondent could have filed its Motion to Dismiss the Permit Appeal as to Additional Condition No. 6 and its Motion for Extension on August 8, 2022. 35 Ill. Adm. Code 101.500, 101.506, 105.116(a). Rather, by filing such motions on August 2, 2022, Petitioner had the ability to file responses in advance of the next scheduled Board hearing on August 11, 2022. In fact, on August 3, 2022, Respondent filed its Response.

Third, Petitioner has not provided any support for its belief that the Board cannot issue its Permit Appeal ruling in advance of the November 7, 2022 decision deadline if the Motion for Extension is granted. Rather, through its filing of the Petition in six business days, *see* Response at ¶ 3, and its Response to the Motion for Extension in one business day, *see* Permit Appeal docket, Petitioner has shown that a lengthy briefing schedule, on its part, will not be necessary. Similarly, Respondent waived its right to contest service, sought only a one-week extension to respond to Petitioner's Motion for Partial Stay, has timely filed each of its motions in this Permit Appeal, and is properly seeking to narrow the issues for the Board's determination, thereby evidencing its

intention to ensure that the Board meets the decision deadline. *See supra* pp. 2-4. Based upon the foregoing, no “obfuscation and delay”, Response at ¶ 9, has occurred in this Permit Appeal.<sup>2</sup>

**III. Conclusion.**

Respondent timely-filed its Motion for Extension in accordance with 35 Ill. Adm. Code 105.116(a) and the Board’s July 21, 2022 Order, in which it set forth proper support for the requested extension. Contrary to Petitioner’s unsupported allegations, no “pattern” of “delay” exists in this Permit Appeal, Response at ¶ 9, and an extension of time to file the Record will not interfere with the Board’s ability to meet the November 7, 2022 decision deadline. Accordingly, the Motion for Extension should be granted.

ILLINOIS ENVIRONMENTAL  
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<sup>2</sup> Petitioner’s unsupported accusations regarding Respondent’s and the Illinois Attorney General’s Office’s actions in the Will County Circuit Court litigation, Response at fn. 4, should be disregarded. 35 Ill. Adm. Code 101.504.